Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

JIM CHOE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner denied his constitutional right to effective assistance of counsel where his trial attorney failed to investigate the authenticity of crucial tape recording evidence his client claimed was false and manufactured?

2. Was petitioner denied his constitutional right to effective assistance of counsel where his trial attorney made misrepresentations of fact in his opening statement which were later used to impeach petitioner when he later testified in his own defense at trial?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Background of the Criminal Conviction.	2
B. The Proceedings in District Court.	2
C. The Proceedings in the Court of Appeals.	4
Reasons for Granting the Writ	4
I. The Petition Should Be Granted Because The Opinion Below Overlooked Material Points Of Fact And Law In Holding That There Was No Ineffective Assistance of Counsel In Trial Counsel's Misrepresentations In His Opening Statement.	4

Contents

		Page
A.	The Ruling Below	4
B.	The Legal Standard	5
C.	Counsel's False Opening Statement.	8
II.	The Petition Should Be Granted Because The Opinion Below Overlooked Material Points Of Fact And Law In Holding That There Was No Ineffective Assistance of Counsel In Trial Counsel's Failure To Investigate The Authenticity Of Critical Government Evidence That Petitioner Claimed Was False And Manufactured By The Undercover Agent.	10
	A. The Ruling Below	10
Conclusion		16

TABLE OF CITED AUTHORITIES

Page

Cases:

Burger v. Kemp, 483 U.S. 776 (1987) 5

Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) 7

Ewing v. Williams, 596 F.2d 391 (9th Cir. 1979) .. 6

Goodwin v. Balkom, 684 F.2d 794 (11th Cir. 1982) 7

Kimmelman v. Morrison, 477 U.S. 365 (1986) 5

Knealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985) . 7

Lockhart v. Fretwell, 113 S. Ct. 838 (1993) 5, 6

Perry v. Leeke, 488 U.S. 272 (1989) 5

Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) 7

Strickland v. Washington, 466 U.S. 668 (1984) ...5, 6, 7, 8

Sullivan v. Fairman, 819 F.2d 1382 (7th Cir. 1987) 7

United States v. Gray, 878 F.2d 702 (3d Cir. 1989) 7

Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994) .. 6, 7

Cited Authorities

	Page
Statutes:	
18 U.S.C. § 371	2
28 U.S.C. § 1254(1)	1
United States Constitution:	
Fifth Amendment	1
Sixth Amendment	2, 5

TABLE OF APPENDICES

Page

Appendix A — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed December 2, 1999 ..... 1a

Appendix B — Memorandum Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed October 29, 1997 ..... 11a

Appendix C — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed January 21, 2000 ..... 17a

Petitioner, Jim Choe, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are unpublished orders, including the first unpublished opinion in Mr. Choe's direct appeal of his conviction and sentence remanding the case for resentencing (App. B), the second unpublished opinion affirming the sentence imposed after remand (App. A), and the order denying the petition for rehearing on the second unpublished opinion (App. C).

STATEMENT OF JURISDICTION

The first unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") remanding the case for further sentencing proceedings was issued on October 29, 1997 (App. B). The second unpublished memorandum opinion of the Court of Appeals affirming the sentence was issued on December 2, 1999 (App. A). The Court of appeals denied the petition for rehearing on January 21, 1998 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

STATEMENT OF THE CASE

A. Background of the Criminal Conviction.

This case involves an appeal from a federal felony criminal conviction. In 1994, petitioner Jim Choe was charged by a federal grand jury in the Northern District of California with one count of conspiracy to receive stolen goods, namely Intel computer chips, from interstate commerce, in violation of 18 U.S.C. § 371. The case arose from a government "sting" operation in which an undercover officer pretended to be selling computer chips. The accusation against Mr. Choe, a Korean citizen who worked for computer businesses near San Jose, California, was that he attempted to purchase stolen computer chips from the undercover agent. The was no dispute that Mr. Choe negotiated to buy the computer chips, and the central issue at trial was whether Mr. Choe knew that the chips being offered by the undercover officer were supposedly stolen. Mr. Choe has always maintained he thought he was making a legal purchase of computer chips, and that the officer never told him the merchandise was stolen.

B. The Proceedings in District Court.

Mr. Choe went to jury trial on these charges in September and October 1995. He testified at trial, and was convicted on the conspiracy charge. After trial, Mr. Choe obtained new counsel, who filed a motion for new trial in December 1995,

and supplemented that motion in March 1996. The motion for new trial alleged ineffective assistance of trial counsel, as well as a claim of newly discovered evidence that a tape recording, used at trial to show Mr. Choe's knowledge of the stolen nature of the property, was fraudulent and manufactured by the undercover officer.

The ineffective assistance issue was based, in part, on: a claim that trial counsel made intentional misrepresentations in his opening statement that Mr. Choe was the owner of a computer business that was in good financial condition, which exposed Mr. Choe to lengthy impeachment during cross-examination of his testimony; and that trial counsel was failed to investigate the authenticity of a recording that purported to be an incriminating conversation between the undercover agent and Mr. Choe, despite Mr. Choe's statements to counsel before trial that the alleged conversation never occurred, when an expert who examined the tape after trial found evidence that the recording was not authentic. An evidentiary hearing on the motion for new trial was held in June 1996. Prior to the hearing, the court denied defendant's request for the original disputed tape recordings to be examined by a second defense tape expert. The court issued a written order denying the motion for new trial. The defense then filed two motions for reconsideration related to issues in the motion for new trial, presenting further evidence in support of the claim that the tape recording was fabricated. The court also denied the motions for reconsideration.

In December 1996, Mr. Choe was sentenced to 33 months imprisonment, to be followed by a period of three years of supervised release.

C. The Proceedings in the Court of Appeals.

Petitioner Jim Choe appealed his conviction and sentence to the court of appeals. On October 29, 1997, a three-judge panel of that court affirmed the conviction, but found error in the calculation of Mr. Choe's sentence and remanded the case for resentencing (App. B).

Pursuant to the court of appeals' remand, petitioner appeared in front of the district court for resentencing in May 1998. After hearing argument regarding the issue on remand, the district court imposed the same term of imprisonment as in the original judgment, but amended the judgment to reduce the period of supervised release by one year. Petitioner appealed from the amended judgment, which was affirmed by the court of appeals in December 1999 (App. A).

REASONS FOR GRANTING THE WRIT

I.

The Petition Should Be Granted Because The Opinion Below Overlooked Material Points Of Fact And Law In Holding That There Was No Ineffective Assistance of Counsel In Trial Counsel's Misrepresentations In His Opening Statement.

A. The Ruling Below

In deciding the claim of ineffective assistance of counsel in petitioner's appeal, the court of appeals held that:

> Counsel was not ineffective when he made his opening statement about the health and ownership

> of Super Workstation, when he did not attack the authenticity of the cellular phone tape, or when he failed to call character and secondary market witnesses. His investigations were reasonable, as were his tactical choices.

(App. B at 12a)

B. The Legal Standard

This Court has long held a criminal defendant is entitled to a new trial if his attorney did not provide the effective assistance of counsel at trial, as guaranteed by the Sixth Amendment. The test for determining whether a defendant received constitutionally inadequate representation was set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), in which this Court stated:

> In giving meaning to the requirement [of effective assistance], . . . we must take its purpose — to insure a fair trial — as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced the just result.

See also Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993); *Perry v. Leeke*, 488 U.S. 272, 279 (1989); *Burger v. Kemp*, 483 U.S. 776, 795-96 (1987); *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

To guide a court in making such a determination, this Court created a two-pronged test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable.

Strickland v. Washington, *supra*, 466 U.S. at 687. *See also Lockhart v. Fretwell*, *supra*, 113 S. Ct. at 842. Although there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and "judicial scrutiny of counsel's performance must be highly deferential," *Strickland v. Washington*, *supra*, 466 U.S. at 687, counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client. *Id.* at 691. ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.")

In assessing counsel's performance, *Strickland* mandates that "all of the circumstances" be considered, and requires the reviewing to consider the cumulative effect of trial counsel's errors. *Wade v. Calderon*, 29 F.3d 1312 (9th Cir. 1994); *Ewing v. Williams*, 596 F.2d 391, 396 (9th Cir. 1979).

Many federal court decisions have recognized that "at the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkom*, 684 F.2d 794, 805 (11th Cir. 1982); *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Wade v. Armontrout*, 798 F.2d 304, 307 (11th Cir. 1986). Ineffectiveness of counsel is often found in the context of complete failure to investigate, because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when he has not yet obtained the facts on which such a decision could be made. *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989), *citing Strickland v. Washington*, 466 U.S. at 690-91. Counsel's failure to conduct a reasonable investigation into the facts of the case, to interview potential witnesses, and to obtain necessary experts, are not decisions relating to trial strategy. Rather, they are decisions related to the failure to adequately investigate the case. *Chambers v. Armontrout*, 907 F.2d 825, 828 (8th Cir. 1990) (*en banc*); *Sullivan v. Fairman*, 819 F.2d 1382, 1391-92 (7th Cir. 1987).

Under *Strickland v. Washington*, prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, *supra*, 466 U.S. at 694-95. A "reasonable probability" is simply one sufficient to undermine confidence in the outcome; it does not require a defendant to show that counsel's deficient performance altered the outcome. *Id.* at 693-94; *Knealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985). In *Strickland*, the court clearly explained that the "reasonable probability" standard should not be equated with the "probability" or "more likely than not" standard used in other contexts:

> We believe that a defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of a counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Strickland v. Washington, *supra*, 466 U.S. at 693-94.

C. Counsel's False Opening Statement.

The opinion issued by the Court of Appeals overlooked the fact that there was no dispute that defense counsel's opening statement misrepresented to the jury that Mr. Choe was the owner of a business called "Super Workstation." There was no claim by trial counsel that he was negligent in making that assertion, and in fact knew Mr. Choe was not a legal owner, officer, shareholder or director of Super Workstation, Inc. Prior to trial, Mr. Choe told his attorney that he was a consultant and agent of Super Workstation, and not the owner. Nevertheless, during opening statement, trial counsel stated,

> The evidence will show that for some period of time Jim Choe owned and operated a business called Super Workstation, Inc., and there will be reference to that business, Super Workstation, Inc., operated with Jim and his wife as owners and operators and manufactured workstations, computerized workstations for business and government.

RT 9/26/95 at 5. Counsel continued in his opening statement:

> Everything looked legal from the perspective of Jim Choe. He's got a business. He's operating the business. The business is doing well. He has no interest or need to be involved in anything that involves stolen chips or stolen parts.

RT 9/26/95 at 6. In fact, Super Workstation was in very poor financial condition at the time of the alleged offense.

Counsel's knowing misrepresentations of Jim Choe as the owner of Super Workstation, as well as the financial condition of Super Workstation at the time of the alleged incidents, was serious forensic misconduct. His statements were knowing falsehoods, and they opened the door for the government to introduce evidence that the corporation, of which defendant Choe was not really an owner or shareholder, was in terrible financial condition. Moreover the opening statement contradicted appellant's trial testimony that he was not the owner of Super Workstation.

These misrepresentations in the defense opening statement had disastrous consequences for Mr. Choe when he testified. Near the beginning of cross-examination, the government successfully argued to the court that because "he [defense counsel] said in his opening statement 'you'll see there's no motivation to do this because business was doing well' " that the government was entitled impeach Mr. Choe with evidence of the poor financial condition of Super Workstation at the time of this transaction. RT 10/2/95 at 105. The government cross-examined Mr. Choe about numerous outstanding civil judgments against Super Workstation. Mr. Choe, the supposed owner of the company, had no knowledge of many of those judgments. The government was thus allowed to present to

the jury the image of a desperate business owner in need of quick cash, a fairly damning motive for involvement in illegal financial transactions, because the defendant's counsel made knowing misrepresentations about those subjects in his opening statement. Counsel told the court he was completely unaware of the existence of these judgments.

The opinion essentially holds that it is not ineffective assistance of defense counsel to make knowing misrepresentations to a jury, which result in impeachment of the defendant. First of all, no lawyer is allowed to knowingly misrepresent the facts to a jury in their opening or closing statement. When the fact of such knowing misrepresentations are coupled with prejudice to the defendant, in the form of impeachment as well as presentation of government witness who otherwise would not have testified but for the misrepresentation, then counsel's errors must surely constitute ineffective assistance of counsel.

II.

The Petition Should Be Granted Because The Opinion Below Overlooked Material Points Of Fact And Law In Holding That There Was No Ineffective Assistance of Counsel In Trial Counsel's Failure To Investigate The Authenticity Of Critical Government Evidence That Petitioner Claimed Was False And Manufactured By The Undercover Agent.

A. The Ruling Below

As stated in the preceding argument, the opinion of the court of appeals concluded that trial counsel's conducted a reasonable investigation of the authenticity of the recording

of the purported cellular phone call from the agent to Mr. Choe. A review of the facts and circumstances surrounding the supposed "investigation" shows that the court of appeals' conclusion was clearly erroneous. The same legal rules regarding ineffective assistance of counsel discussed in the preceding argument are equally applicable to this argument and reason for granting petitioner a writ of certiorari.

Before trial, the government produced to petitioner's attorney a copy of a tape recording allegedly made by the undercover agent of cell phone conversations he purportedly had with Mr. Choe. In these recordings, which were made by the agent holding a small tape recorder near his cell phone while talking on the phone, contain only the agent's voice, in which he is heard to talking to somebody about goods coming from a robbery. Mr. Choe repeatedly told his trial counsel that he never had a conversation with the agent in which the agent told him that the computer chips were coming from a robbery. Mr. Choe also told his attorney that another of the government's tape recordings, of a different face-to-face meeting on the same day of the disputed recording, was missing a portion of the conversation where Mr. Choe told the agent he would only engage in a cash transaction if it was legal.

There were circumstances surrounding the tapes that should have caused counsel to investigate their authenticity. First of all, his client was adamant that the cellular phone call on August 16th, the "rob" call, never occurred. The fact that only the agent's side of that telephone conversation could be heard supports Mr. Choe's claim of fabrication. With regard to the face-to-face meeting on August 16th, counsel knew that the conversation occurred in a hotel parking lot in close proximity to the San Jose International Airport, yet

the tape recording contained no background noise of jet planes. This peculiar absence of background noise is consistent with the recording being altered to eliminate all ambient, or background, noise from the tape in order to conceal the characteristic sounds created when portions of a recording are erased and edited. Additionally, the agent's trial testimony that he made the "rob" call from Palo Alto thirty minutes after the first call was contradicted by the agent's cellular phone records which reflected the second call was made only ten minutes after the first call.

Given these circumstances, where the client states that a highly incriminating conversation never occurred and that expulpatory statements are missing from another taped conversation, coupled with the fact that other aspects of the recordings are suspect, the lawyer's duty to investigate the authenticity of those tape recordings is both obvious and imperative. Nevertheless, trial counsel failed to have the tape recordings examined by an expert for authenticity, or to conduct any other investigation that might lead to an attack on the tape evidence.

It is important to note that a cursory examination of the Mr. Choe's cellular phone records would have shown trial counsel that there was corroboration for Mr. Choe's denial of participation in the alleged August 16th telephone call mentioning "rob", and that further expert examination as to the authenticity of that recording was warranted. When post-trial counsel obtained defendant's cellular phone records, those records were compared to the agent's phone records. This comparison revealed that Mr. Choe was actually on his cellular phone with another unrelated phone call at the time the agent's records show he called Mr. Choe's cellular phone.

The agent's telephone records reflect two calls made on August 16, 1994, as of 15:52 and 15:53, which corresponds to two one minute calls to Mr. Choe's telephone. At 15:56, Mr. Choe received an incoming call of two minutes in duration. While Mr. Choe was on the phone, the agent made another call at 15:57. This call is not reflected on Mr. Choe's telephone bill because the call was forwarded to the cellular telephone voicemail, and the call did not get posted or charged to the recipient's telephone bill. The voicemail service was included in the basic monthly service charge.

Agent Nguyen made two additional calls at 16:02 and 16:03. The agent's telephone records reflect that the call he made at 16:02 was to defendant Choe's residence (510-657-4789). Defendant Choe's cellular telephone records reflect a call he received at 16:02. This call could not have been from the undercover agent because at that precise time, the agent was calling Mr. Choe's residence. The agent's telephone records reflect that the agent made a telephone call to defendant Choe's cellular phone at 16:03. However, defendant Choe's cellular telephone records do *not* reflect a charge for any call at 16:03. This is because defendant Choe was still on the telephone completing the call he had begun at 16:02. The agent's call to Mr. Choe at 16:03 was not received by Mr. Choe, but was forwarded to the cellular phone voicemail. It is consistent with the earlier 15:57 call that, when a cellular phone call goes to a customer's voicemail, no charge or record appears on the recipient's telephone bill. A review of Mr. Choe's telephone records reflects that no charge or record of his receiving a call at 16:03 exists. Mr. Choe's telephone records reflect an incoming call at 16:02, but no call at 16:03.

Thus, the only calls in which the agent spoke directly with Mr. Choe were the first two calls at 15:52 and 15:53, which are the only two calls that corroborate the agent's testimony that he made two completed calls to Mr. Choe.[1] In neither of these calls did the agent use the phrase "rob." The agent testified at trial that the telephone call in which he used the word "rob" was made from Palo Alto approximately ten minutes after the first cellular telephone call he made to Mr. Choe following their face-to-face meeting. (RT vol. 2, 112:23-113:5.) It is thus clear that the "rob" conversation occurred, according to Agent Nguyen, at 16:03 from the government's cellular phone record. While the tape of this telephone call from the agent reflects that the agent spoke the word "rob," the tape does not contain any audible response from Mr. Choe. This is because at the time the agent made the telephone call, the cellular telephone records conclusively demonstrate that the agent was not speaking with Mr. Choe. The government's telephone transcript shows the purported second call that contains the word "rob" occurred before the agent called Mr. Choe's home (510-657-4798) at 16:02, because the agent received Mr. Choe's home number through Mr. Choe's 15:58 page call to his Sky Pager (800-759-7243). "Hello Jim? Okay. I got it all right. Hold on. 510-657-4798. Ok. As soon as I--uh, rob this thing tomorrow---." (Govt. Exhibit 16, tape 197, p. 5, ¶ 3.) It means the agent's purported second call containing the word "rob" must have occurred between 15:58 and 16:02, the time the agent called Mr. Choe's home phone number to his pager and the time he called Mr. Choe's home. However, neither Mr. Choe's nor the government's records show there

1. The call the agent made at 15:52 to Mr. Choe was disconnected due to a bad connection. The agent called Mr. Choe again at 15:53 to request Mr. Choe enter his home telephone number into the agent's Sky Pager (800) 759-7243.

was a call between 15:58 and 16:02, and it provides strong evidence that the tape recording was fabricated by the government.

From this evidence alone, Mr. Choes's lawyer could have reasonably corroborated Mr. Choe's claim that the August 16th "rob" never occurred, and that the agent, whose voice is the only one heard on the tape, probably made the recording by creating a one-way conversation in which he was talking to himself.

Even if trial counsel didn't examine the phone records, he still had an absolute duty to have an audio expert conduct an analysis to determine the authenticity of the questioned tape recordings. Once a client insists that critical recorded conversations never occurred or that important exculpatory portions of other conversations are missing, the lawyer cannot simply ignore such claims. Otherwise, the lawyer is not only failing to adequately investigate the case but is also demonstrating disbelief in the client. Moreover, trial counsel knew before trial that the Mr. Choe planned to testify in order to refute the government's evidence that he knew the computer chips were stolen. Any reasonably competent lawyer knows that a jury will likely reject the testimony of a defendant who makes unsupported denials of incriminating conversations, when weighed against the testimony of a federal agent who is corroborated by an unchallenged tape recording of those purported conversations. Under those circumstances, the lawyer has to make some effort to investigate the authenticity of the tapes and corroborate his client's testimony.

CONCLUSION

For the foregoing reasons, petitioner Jim Choe respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED DECEMBER 2, 1999

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-10251
D.C. No. CR-94-20066-JW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIM CHOE,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California,
James Ware, District Judge, Presiding

Argued and Submitted May 12, 1999
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix A

Before: B. FLETCHER, SILVERMAN, Circuit Judges, and WALTER, District Judge.**

Defendant-Appellant Jim Choe ("Choe") appeals his resentencing for his conviction of conspiracy to receive stolen goods. In Choe's prior appeal, we vacated his sentence and remanded for resentencing, instructing the district court to address issues related to incomplete conspiracy pursuant to § 2X1.1(b) of the United States Sentencing Guidelines ("Sentencing Guidelines" or "U.S.S.G."). *See United States v. Choe*, No. 97-10017, 1997 WL 678366 (9th Cir. Sept. 15, 1997). On remand, the court determined that the substantive acts of the conspiracy were completed and reaffirmed Choe's already-served sentence of imprisonment. The court noted, however, that when Choe was arrested, he did not have the resources in hand to purchase all 6,000 stolen computer chips — the object of the conspiracy — and reduced his period of supervised release from three years to two years.

The parties agree that Choe's appeal is not moot, as this Court's decision could affect Choe's supervised release. *See United States v. Smith*, 991 F.2d 1468, 1470 (9th Cir. 1993). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. We hold that the district court properly rejected a three-level reduction in sentence for an incomplete conspiracy, and we affirm the Court's finding that Choe had completed all of the substantive acts of the conspiracy. The district court's musings that Choe did not have the resources to purchase the 6,000 chips at the time of his arrest and that there were a

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** The Honorable Donald E. Walter, District Judge of the Western District of Louisiana, sitting by designation.

number of things that had to happen before Choe reached that point do not alter its sound finding.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 1995, a jury found Choe guilty of conspiracy to receive stolen goods in violation of 18 U.S.C. § 371. In December 1996, the district court sentenced Choe to thirty-three months imprisonment and three years of supervised release. In October 1997, this Court affirmed Choe's conviction but vacated his sentence and we remanded the case solely for the district court to determine whether Choe had "completed all the acts [he] believed necessary on [his] part for successful completion of" the purchase of 6,000 stolen computer chips. *See Choe*, 1997 WL 678366 at *2, and United States Sentencing Guidelines ("U.S.S.G.") § 2X1.1(b)(2). Choe insists that he was entitled to the three-level reduction for incomplete conspiracy, as he was arrested during his first attempt to purchase 2,500 chips.

In resentencing, the district court specifically found that the conspiracy had been completed, stating

> [t]he reason this case was sent back to the court is that I did not articulate on the record my findings with respect to whether or not all of the substantive acts of a conspiracy to purchase 6,000 chips had been completed.
>
> **I find that they were.** There was an agreement to do it and there were acts in

> furtherance of that agreement that did indeed take place. *Transcript of Resentencing Proceedings*, May 27, 1998, at 12-13 (emphasis added).

The court acknowledged that "although [Choe] had agreed to purchase that large quantity, [he] didn't have the resources to do it in hand at the time." The court further stated that it did not "believe that [his] arrest was the only thing that prevented [him] from going ahead and purchasing the other chips. There were a number of things that had to happen before [he] got to that point . . . including obtaining the financing, which is a significant event." The court noted that Choe appeared to be financing his purchase with other people's money and referenced a vague recollection of Choe's losing a lot of money gambling between the time he received the money and the time the transaction took place. As such, "it could have been that [he] had the money available to purchase a larger quantity, but as a result of this detour through Las Vegas or Reno, [his] resources were somehow reduced."

Specifically "putting that aside," the court denied the three-level reduction under § 2X1.1(b)(2) and reconfirmed the offense level of nineteen, with an imprisonment range of thirty to thirty-seven months, and a sentence of thirty- three months (the term originally given). However, the court reduced the term of supervised release from three years to two years. At the time of the resentencing hearing, Choe had already served the sentence of imprisonment and was on supervised release (which he is currently serving).

Appendix A

II. DISCUSSION

This Court reviews the interpretation and application of the Sentencing Guidelines de novo. *United States v. Naranjo*, 52 F.3d 245, 248 (9th Cir. 1995). Factual findings in the sentencing phase are reviewed for clear error. *United States v. Castaneda*, 94 F.3d 592, 594 (9th Cir. 1996). Whether a reduction under § 2X1.1 is warranted is a fact-specific inquiry. *United States v. Martinez-Martinez*, 156 F.3d 936, 939 (9th Cir. 1998).

Because this Court's decision could affect Choe's supervised release, Choe's appeal is not moot. *See Smith*, 991 F.2d at 1470. Choe contends that the district court erred in failing to make a three-level reduction in his offense level for an incomplete conspiracy as provided in § 2X1.1(b)(2). That provision provides that, in cases of a conspiracy, the court should

> decrease by **3** levels, unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control. U.S.S.G. § 2X1.1(b)(2).

Application Note 4 provides that:

> [i]n certain cases, the participants may have completed (or have been about to complete but

> for apprehension or interruption) all of the acts necessary for the successful completion of part, but not all, of the intended offense. In such cases, the offense level for the count (or group of closely related multiple counts) is whichever of the following is greater: the offense level for the intended offense minus 3 levels (under § 2X1.1(b)(1), (b)(2), or (b)(3)(A)), or the offense level for the part of the offense for which the necessary acts were completed (or about to be completed but for apprehension or interruption). For example, where the intended offense was the theft of $800,000 but the participants completed (or were about to complete) only the acts necessary to steal $30,000, the offense level is the offense level for the theft of $800,000 minus 3 levels, or the offense level for the theft of $30,000, whichever is greater. U.S.S.G. § 2X1.1 app. n. 4.

As in the first appeal, Choe continues to maintain that under U.S.S.G. § 2X1.1(b)(2), he is entitled to a decrease of three levels unless "all the acts the conspirators believed necessary on their part for successful completion of the substantive offense" have been completed or are about to be completed. U.S.S.G. § 2X1.1(b)(2). He maintains that the district court made an ambiguous ruling as to wether he had completed the conspiracy. Although the court did not make a three-level reduction in Choe's offense level, Choe contends that it appears that it intended to provide the same net relief requested by lowering the period of supervised release. Choe urges the appropriate remedy was a reduction in the offense level, not in the period of supervised release.

Appendix A

The Government insists that the district court squarely addressed the issue of whether Choe had "completed all the acts [he] believed necessary on [his] part for successful completion of" the purchase of the 6,000 chips. *Id.* Moreover, the Government notes that this Court specifically stated in its earlier disposition remanding for resentencing that "if [the district court] determines that the reduction does not apply, it may reinstate the sentence." *See Choe*, 1997 WL 678366, at *2. This, asserts the Government, is precisely what the district court did.

The Government points out that the relevant facts are uncontested and were outlined in this Court's prior decision, which explained:

> Choe testified that he had an agreement with a business associate regarding the chips: the associate gave him $400,000 to purchase the first 2,500 chips and had signed a contract agreeing to buy a total of 5,000 chips from Choe. Of course, Choe did not yet have the money to purchase 3,500 additional chips. Nonetheless, he had promised Officer Nguyen he would buy all 6,000 chips, he had his buyer lined up and bound to a purchase contract for enough money to allow purchase of all the chips, and he had no reason to believe that his buyer would not provide the funds promised for the second installment. Moreover, it appears that his contract with his buyer would earn him a tidy profit. He was purchasing 6,000 chips for $810,000 and selling 5,000 chips for $850,000. And the buyer was going to receive

> even more expensive chips than he had bargained for. Still and all, Choe did not actually have the second installment of his buyer's money in hand. *Id.*

The Court concluded that, "[t]he ultimate decision regarding § 2X1.1(b) could go either way" but that it was not a decision for the circuit court to make. *Id.* The Government asserts that the district court considered this issue at resentencing, and after hearing the argument of counsel, again held that Choe was convicted of a conspiracy in which he agreed to purchase 6,000 chips. Moreover, the court found that Choe took steps to accomplish the crime, including for example, meeting with others to arrange financing for "something [he] wanted to have happen."

The Government contends that Choe is attempting to manufacture ambiguity in the district court's clear finding based on the judge's comments that Choe, although completing the substantive acts of the conspiracy, did not have the resources to take possession of all 6,000 stolen chips That Choe elected to take possession of the chips in two installments does not render the conspiracy incomplete or the court's finding that the conspiracy was complete "clearly erroneous ." For example, on the day of his arrest, Choe told Tommy that he would buy the balance of the chips the following week as they were walking to the van to buy the first installment.

The district court noted that the charge was *conspiracy* to purchase stolen chips, not simply a charge of purchasing chips. It concluded that Choe "wanted, and [he] agreed, to

purchase 6,000 chips." The record supports the district court's finding that all the acts necessary for the conspiracy were completed or would have been completed but for Choe's arrest.[1]

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1. *See United States v. Petersen*, 98 F.3d 502 (9th Cir. 1996) (rejecting a § 2X1.1(b)(2) reduction because the offense was substantially completed). *See also United States v. Yellowe*, 24 F.3d 1110, 1113 (9th Cir. 1994) (holding that defendant was not entitled to a three-level reduction where the sole reason the offense was not completed was intercession by law enforcement authorities and the fact that the terminals by which defendant would access funds were not connected to a bank); *United States v. Chapdelaine*, 989 F.2d 28, 35 (1st Cir. 1993) (affirming denial of three-level decrease in offense level because completion of the robbery was frustrated only by change in the Wells Fargo truck's schedule), *cert. denied*, 510 U.S. 1046 (1994); *United States v. Toles*, 867 F.2d 222, 223 (5th Cir. 1989) (finding that defendant who had given demand note to teller without keys to cash box had completed all acts necessary for successful completion of robbery and was not entitled to three-level reduction).

The Government distinguishes this Court's recent decision in *Martinez-Martinez*, which held that the district court clearly erred in denying a three-point reduction for an incomplete conspiracy. *Martinez-Martinez*, 156 F.3d at 940. We agree with the government's contention that this Court's recent decision in *Martinez-Martinez*, which held that the district court clearly erred in denying a three point reduction for an incomplete conspiracy, is distinguishable because that defendant needed to obtain the approval of his "boss" to steal goods before the conspiracy could be completed.

III. CONCLUSION

The district court did not clearly err in rejecting the three-level reduction in sentence for an incomplete conspiracy. Notwithstanding its musings otherwise, that court specifically found that all of the substantive acts of the conspiracy were completed. As this Court previously acknowledged, the ultimate decision regarding § 2X1.1(b) could go either way; the district court properly determined that such a reduction was not warranted.

AFFIRMED.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED OCTOBER 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-10017
D.C. No. CR-94-20066-JW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIM CHOE,

Defendant-Appellant.

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Submitted September 15, 1997**
San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without oral argument pursuant to 9th Cir. R. 34-4 and Fed. R. App. P. 34(a).

Appendix B

Before: KOZINSKI, MAYER,*** and FERNANDEZ, Circuit Judges.

Jim Choe appeals his sentence and the district court's denial of his motion for a new trial filed after a jury convicted him of conspiracy to receive stolen goods from interstate commerce. We affirm the conviction but vacate and remand the sentence.

A. *Ineffective Assistance of Counsel*

Choe raises a host of claims about his trial counsel's effectiveness. We have analyzed each of those claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and we decline Choe's invitation to second guess his trial counsel's judgments. *See United States v. Quintero-Barraza*, 78 F.3d 1344, 1348 (9th Cir. 1995), *cert. denied*, __ U.S. __, 117 S. Ct. 135, 136 L. Ed. 2d 83 (1996).

Counsel was not ineffective when he made his opening statement about the health and ownership of Super Workstation, when he did not attack the authenticity of the cellular phone tape, or when he failed to call character and secondary market witnesses. His investigations were reasonable, as were his tactical choices. *See, e.g.*, *Clabourne v. Lewis*, 64 F.3d 1373, 1382-83 (9th Cir. 1995); *Bonin v. Calderon*, 59 F.3d 815, 835-36 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S. Ct. 718, 133 L. Ed. 2d 671 (1996). Nor

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*** Hon. H. Robert Mayer, United States Circuit Judge for the Federal Circuit, sitting by designation.

did he err regarding his jury instruction requests or in advising his client. Finally, Choe's undifferentiated claim that counsel should have made some sort of pretrial motion is not fleshed out, so we deem it abandoned. *See United States v. Tisor*, 96 F.3d 370, 376 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1012, 136 L. Ed. 2d 889 (1997).

B. *Ruling on Defense Attorney Expert*

Choe argues that the district court abused its discretion by excluding the declaration from a defense attorney which Choe filed in support of his motion for a new trial. We disagree. A district court does not abuse its discretion by excluding a purported "*Strickland* expert," such as the one presented here, when the court itself is qualified to assess the factual and legal issues involved in a *Strickland* claim. *Bonin*, 59 F.3d at 838.

C. *Denial of the Motion for Reconsideration*

Choe appeals the denial of his motion for reconsideration regarding the tape. However, he failed to present any new evidence that could not have been discovered before he filed his original motion regarding the tape. Moreover, the new expert's conclusion that there were "questions" about the authenticity of the tape was neither remarkable nor new evidence; Choe had been raising "questions" about the tape since he filed the motion for a new trial. The district court did not abuse its discretion when denying the motion for reconsideration. *See United States v. Wardlow*, 951 F.2d 1115, 1116 (9th Cir. 1991) (per curiam); *United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987).

Appendix B

D. *Material Considered at Sentencing*[1]

Choe argues that the district court should have stricken irrelevant information from the PSR. Choe recognizes that the district court did not rely upon the offending information in its sentencing decision. Thus, what Choe seems to seek is an order from us striking the offending paragraphs from the PSR, and not a remand on this point. However, Choe again cites absolutely no authority and makes no reasoned argument.

Construing his bald assertions in the best possible light, what Choe seems to be arguing is that there was a technical violation of Federal Rule of Criminal Procedure 32(c)(1). *See United States v. Gutierrez-Hernandez*, 94 F.3d 582, 584 (9th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 752, 136 L. Ed. 2d 689 (1997). However, he has given us no indication that the district court did not, in fact, attach a copy of its ruling to the Bureau of Prisons' copy of the PSR. If it did not do so, Choe can bring that technical failure to the attention of the district court on remand. In any event, it would not require resentencing. *See United States v. Fernandez-Angulo*, 897 F.2d 1514, 1517 (9th Cir. 1990) (en banc).

E. *USSG § 2X1.1(b)*

Finally, Choe argues that his offense level should have been reduced three levels under USSG § 2X1.1(b) because

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1. The district court properly used the November 1, 1995 version of the Guidelines to sentence Choe.

he did not complete a transaction involving all 6,000 chips. That section allows a decrease in the offense level for some conspirators who have not completed all acts they believe necessary to successfully complete the substantive offense. *See United States v. Petersen*, 98 F.3d 502, 509 (9th Cir. 1996); *United States v. Yellowe*, 24 F.3d 1110, 1112-13 (9th Cir. 1994); *see also United States v. Chapdelaine*, 989 F.2d 28, 35 (1st Cir. 1993). The district court made a factual finding that the object and intent of the conspiracy was to purchase all 6,000 chips. The district court then heard arguments regarding § 2X1.1(b)(2) and did not apply the reduction. However, it did not make a finding that Choe had "completed all the acts [he] believed necessary on [his] part for successful completion of" the purchase of 6,000 chips. *See* USSG § 2X1.1(b)(2).

Choe testified that he had an agreement with a business associate regarding the chips: the associate gave him the $400,000 to purchase the first 2,500 chips and had signed a contract agreeing to buy a total of 5,000 chips from Choe. Of course, Choe did not yet have the money to purchase 3,500 additional chips. Nonetheless, he had promised Officer Nguyen he would buy all 6,000 chips, he had his buyer lined up and bound to a purchase contract for enough money to allow purchase of all the chips, and he had no reason to believe that his buyer would not provide the funds promised for the second installment. Moreover, it appears that his contract with his buyer would earn him a tidy profit. He was purchasing 6,000 chips for $810,000 and selling 5,000 chips for $850,000. And the buyer was going to receive even more expensive chips than he had bargained for. Still and all, Choe did not actually have the second installment of his buyer's

money in hand. The ultimate decision regarding § 2X1.1(b) could go either way, but it is not one for us to make.

Thus, we vacate the sentence and remand to the district court so that it can explicitly make the determination under § 2X1.1(b). It need not revisit any of the other sentencing factors when it does so, and if it determines that the reduction does not apply, it may reinstate the sentence.

AFFIRMED as to conviction. **VACATED** and **REMANDED** as to sentence.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 21, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-10251
D.C. No. CR-20066-JW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JIM CHOE,

Defendant-Appellant.

ORDER

Before: B. FLETCHER and SILVERMAN, Circuit Judges, and WALTER,[1] District Judge.

The panel has voted unanimously to deny defendant-appellant Jim Choe's petition for rehearing.

The petition for rehearing is DENIED.

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1. The Honorable Donald E. Walter, United States District Judge for the Western District of Louisiana, sitting by designation.